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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Berendo Property, et al.,

10 Plaintiffs,

11 v.

12 Closed Loop Refining and Recovery
13 Incorporated, et al.,

14 Defendants.

No. CV-22-01721-PHX-SMM

ORDER

15 Pending before the Court is Plaintiffs and Defendant UNICOR's Joint Motion for
16 Entry of Consent Decree. (Doc. 18).

17 **I. BACKGROUND**

18 Plaintiffs are four companies who, between them, own two warehouses in Phoenix,
19 Arizona. (Doc. 1 at 3). Between 2010 and 2016, Plaintiffs leased these warehouses to
20 Defendant Closed Loop Refining and Recovery, Inc. (Id. at 4). Closed Loop used these
21 warehouses to operate recycling centers that recycled—or claimed to recycle—CRT waste.
22 (Id. at 11-12). CRT (cathode ray tubes) are used in older television, computer, and other
23 electronic displays and contain lead, which is listed as a hazardous substance under the
24 Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA").
25 (Id. at 2-3).

26 Plaintiffs allege that Closed Loop operated a sham recycling scheme, in which it
27 charged companies for accepting their CRT waste and—rather than recycling it in
28 accordance with CERCLA—stockpiled and ultimately abandoned it. (Id. at 12). Plaintiffs

1 allege that Closed Loop accepted approximately 195 million pounds of CRT waste, of
 2 which 106 million was abandoned at the warehouses. (Id.) They allege that the cost of
 3 removing the waste and cleaning up the warehouse sites may exceed \$15 million. (Id. at
 4 20).

5 On October 7, 2022, Plaintiffs filed suit against 51 defendants, seeking cost
 6 recovery, declaratory relief, and common law damages. (Doc. 1). Defendants include
 7 Closed Loop and 50 Arranger/Transporter Defendants, among them Federal Prisons
 8 Industries, Inc., a wholly-owned government corporation, doing business as UNICOR. (Id.
 9 at 10). According to Closed Loop’s records, UNICOR arranged for the transport of over
 10 14 million pounds of waste to the warehouses. (Doc. 18 at 2).

11 On October 31, 2022, Plaintiffs and UNICOR filed a Joint Motion for Entry of
 12 Consent Decree. (Doc. 18). Under the proposed consent decree, the United States, on
 13 behalf of UNICOR, agrees to pay Plaintiffs \$995,000. (Doc. at 7). This money will go
 14 towards response costs. (Id.) No objection to the proposed consent decree has been filed.

15 **II. DISCUSSION**

16 **A. Legal Standard**

17 In determining whether to approve a consent decree in the CERCLA context, a court
 18 need not determine whether the settlement is the best possible settlement available. City of
 19 Colton v. Am. Promotional Events, Inc., 281 F. Supp. 3 1009, 1012 (C.D. Cal. 2017).
 20 Rather, courts must determine whether the proposed settlement is procedurally fair,
 21 substantively fair, reasonable, and consistent with the policies of CERCA. State of Arizona
 22 v. Nucor Corp., 825 F. Supp. 1452 (D. Ariz. 1992), aff’d on other grounds, 66 F.3d 213
 23 (9th Cir. 1995), United States v. Montrose Chemical Corp. of Calif., 50 F.3d 741 (9th Cir.
 24 1995).

25 **B. Procedural Fairness**

26 To determine procedural fairness, courts “must look to the negotiation process and
 27 ‘attempt to gauge its candor, openness, and bargaining balance.’” Nucor, 825 F. Supp. at
 28 1456 (quoting U.S. v. Cannons Eng’g Corp., 899 F.2d 79, 86 (1st Cir. 1990)). Toward this

1 end, the parties state that negotiations were executed in good faith and at arm's length.
2 (Doc. 18 at 6).

3 The Court finds the consent decree was the result of procedural fairness. Both
4 parties were represented in settlement negotiations by experienced attorneys. (Doc. 18-1 at
5 4). Plaintiffs have diligently identified and named as Defendants all potentially responsible
6 parties and have invited all Defendants to negotiate settlements. (Doc. 18-1 at 20). These
7 negotiations with other Defendants are ongoing. (Id.)

8 C. Substantive Fairness and Reasonableness

9 Substantive fairness “concerns the issues of corrective justice and accountability.”
10 Nucor, 825 F. Supp. at 1458. “A party should bear the costs of the harm for which it is
11 legally responsible.” Cannon, 899 F.2d at 87. In determining the reasonableness of a
12 consent decree, courts will consider the “efficacy of the settlement in compensating the
13 public for actual and anticipated remedial and response costs and the relative strength of
14 the parties’ litigating.” Nucor, 825 F. Supp. at 1464. As part of this analysis, courts examine
15 whether the settlement amount is proportional to the settling defendant’s share of
16 responsibility for the environmental damage. Montrose, 50 F.3d at 747; Cannons, 899 F.2d
17 at 87.

18 The parties’ proposed consent decree is substantively fair and reasonable. Plaintiffs
19 allege—based on Closed Loop’s records—that UNICOR was responsible for 14 million
20 out of the 195 million tons of CRT waste that reached the warehouse. This amounts to a
21 little over 7% of the total CRT waste. The estimated cleanup cost is over \$15 million. The
22 \$995,000 that UNICOR is agreeing to contribute to cleanup costs therefore represents a
23 little over 6.6% of the total cleanup costs. Because the settlement amount is proportional
24 to UNICOR’s share of responsibility and the funds will be put toward cleanup efforts, the
25 consent decree is substantively fair and reasonable.

26 E. Consistency with CERCLA

27 One of CERCLA’s primary goals is encouraging early settlements. See Montrose at
28 745-56. This helps further the goal of ensuring prompt site cleanups. Nucor, 825 F. Supp.

1 at 1464. An additional goal of CERCLA is to ensure accountability from those responsible
2 for any abandoned waste. Id.

3 Parties' consent decree is firmly in line with these goals. This settlement is
4 prompt—filed less than a month after Plaintiffs filed their initial complaint. It will
5 streamline any future litigation by removing a defendant from the case and will quickly
6 transfer money into the cleanup fund. Further, it holds UNICOR accountable for their
7 contribution to the abandoned CRT waste at the warehouses.

8 F. Pro Tanto v. Pro Rata Crediting

9 Under CERCLA, district courts have discretion in allocating response costs among
10 liable parties. Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 21 (1st Cir. 2004). In
11 determining how one defendant's settlement affects the liability of other defendants, courts
12 may employ either a *pro tanto* or *pro rata* crediting approach. Ameripride Servs. Inc. v.
13 Texas E. Overseas Inc., 782 F.3d 474, 483-4 (9th Cir. 2015). Under a *pro rata* approach, a
14 court must determine the liability of all settling and non-settling defendants and then reduce
15 the shares of non-settling defendants by the percentage of the settlor's fault. Akzo Nobel
16 Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999). Under the *pro tanto*
17 approach, non-settling defendants' liability is simply reduced by the dollar amount of the
18 settlements. Ameripride, 782 F.3d at 484.

19 In the CERCLA context, *pro tanto* crediting encourages defendants to settle and
20 plaintiffs to promptly and voluntarily clean up hazardous substances. Ameripride, 782 F.3d
21 at 487. It is also easier to apply here than the *pro rata* approach, which would necessitate
22 that the Court determine the liability of 50 other Defendants before it can approve the
23 Consent Decree.

24 The Court uses its discretion to hold that UNICOR's settlement payment will be
25 credited *pro tanto* in determining other Defendants' equitable shares of remediation costs.

26 **III. CONCLUSION**

27 Because the consent decree is substantively and procedurally fair, reasonable, and
28 consistent with CERCLA, the Court will grant the Motion to Enter (Doc. 18), approve the

1 settlement, and sign and enter the consent decree.

2 Accordingly,

3 **IT IS HEREBY ORDERED** granting the Joint Motion for Entry of Consent
4 Decree. (Doc. 18). The consent decree will be entered as a separate document.

5 **IT IS FURTHER ORDERED** that parties shall file a notice when payment has
6 been made in accordance with the Consent Decree. Upon receipt of such notice, the Court
7 shall dismiss with prejudice Plaintiffs' claims against Defendant UNICOR.

8 **IT IS FURTHER ORDERED** that Defendant UNICOR's settlement payment will
9 be credited *pro tanto* in determining other Defendants' equitable shares of remediation
10 costs.

11 Dated this 15th day of November, 2022.

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14 Honorable Stephen M. McNamee
15 Senior United States District Judge
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